

**BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND**

ROBERT A. ZICH

Complainant

v.

**DECOVERLY I HOMEOWNERS
ASSOCIATION, INC.**

Respondent

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Case No. 73-07

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland (the “Commission”) for hearing on July 15, 2008, pursuant to Chapter 10B of the Montgomery County Code (“MC Code”). The duly appointed Hearing Panel (“Panel”), having considered the testimony and evidence of record finds, concludes and orders as follows.

I. Background

Complainant Robert A. Zich (“Mr. Zich”) filed a complaint against Respondent Decoverly I Homeowners Association, Inc. (the “Association”) in early November 2007, alleging in substance that at a meeting of the Association’s Board of Directors held on July 16, 2007, a director who voted in favor of certain action involving an architectural matter had a conflict of interest and should have been disqualified from voting on the matter. Mr. Zich asks the Panel to void the vote and require the Association to conduct a new vote without the participation of the director in question.

The Association denies that the voting was improper.

II. The Hearing

At the outset of the hearing the Panel received in evidence without objection Commission Exhibits 1 and 2. Although other documents were referenced and exhibited at the hearing, none was formally offered or received in evidence.

Commission Exhibit 1 is the Commission's file in this case. It includes Mr. Zich's complaint, minutes of the Association's July 16, 2007 and November 19, 2007 Board meetings, and correspondence between the parties and the Commission staff. Commission Exhibit 2 contains materials from two other Commission cases – *Cunningham & Fisher v. Decoverly I Homeowners Ass'n*, No. 31-06 (the "*Fisher*" case), and *Decoverly I Homeowners Ass'n v. Kidd*, No. 69-06 (the "*Kidd*" case) – the relevance of which will be apparent.¹

Mr. Zich was the sole witness during the complainant's case-in-chief. He testified that at the Association's annual meeting in March 2007 the Association's Board was expanded from 5 to 7 members and residents Lynn Fisher ("Ms. Fisher") and William Kidd ("Mr. Kidd") were elected to the Board. At the time, both Ms. Fisher and Mr. Kidd were in dispute with the Association over separate architectural issues – the *Fisher* and *Kidd* cases, respectively.

Mr. Zich testified that the *Kidd* case involved Mr. Kidd's removal of a balustrade from the front of his home without Association approval and in violation of the Association's architectural guidelines.² He stated that the dispute had reached a Commission panel, which ordered the Association to provide a hearing to Mr. Kidd before the Association's Board. He further stated that at a Board meeting held on July 16, 2007, the Board voted to approve Mr. Kidd's removal of the balustrade, with Mr. Kidd abstaining from the vote and Ms. Fisher voting in favor.

Mr. Zich stated that the factual information before the Board when it took its vote – that the balustrade was responsible for leaks into Mr. Kidd's home – was incorrect. He further stated that close to one-half the homes in the Decoverly I community had balustrades. (The Panel did not consider any evidence concerning the merits of the

¹ None of the Commission panel members who heard the *Fisher* and *Kidd* cases is a member of this Panel.

² Mr. Zich exhibited photographs at the hearing purporting to show Mr. Kidd's home after removal of the balustrade, and showing another home with a balustrade. Based on the photographs, the balustrade in question appears to be a decorative or protective railing for second-floor windows above the front door.

balustrade issue, as that issue had been previous resolved and was not properly before the Panel.)

Mr. Zich testified that Ms. Fisher had been ordered by a Commission panel to correct her own architectural violation and to pay \$2,800 in legal fees to the Association, and that she had appealed that order to the Circuit Court for Montgomery County. She later dismissed the appeal. On November 19, 2007, a motion was made before the Association's Board to relieve Ms. Fisher of the attorney's fee obligation. Ms. Fisher abstained. Although the motion failed, Mr. Kidd voted for the motion.

Mr. Zich argued that it was improper for a director to be voting on *any* architectural matter when he or she had a pending architectural case of his or her own. He further argued that Mr. Kidd's vote in favor of Ms. Fisher in November 2007 was the *quid pro quo* for Ms. Fisher's vote in favor of Mr. Kidd in July 2007. In addition, he argued that as to architectural issues generally, the Board treats its own members more favorably than other Association residents.

At the conclusion of complainant's case-in-chief, the Association moved to dismiss for failure to present a *prima facie* case. The Panel denied the motion without prejudice.

The Association called Mr. Kidd and Mr. Zich as witnesses.

Mr. Kidd testified that there was no agreement between him and Ms. Fisher regarding the July and November votes. Asked to explain his November vote to relieve Ms. Fisher of the \$2,800 legal fee award, he stated that he had campaigned for a position on the Board because he felt that the Board had been too rigid in the past in its enforcement of architectural guidelines. When it came time to vote in November, he felt that the \$2,800 award was a relic of the former Board; that Ms. Fisher had remedied the architectural violation that gave rise to the award; and that \$2,800 was a lot for an individual homeowner to pay.

Mr. Kidd conceded on cross-examination that he had erred in removing the balustrade without prior Board approval.

On examination by counsel for the Association, Mr. Zich agreed that he viewed himself as a watchdog over architectural matters and, should the Board fail to enforce architectural guidelines in the future, he was prepared to file additional complaints with the Commission.

The minutes of the July 16, 2007 Board meeting, as contained in Commission Exhibit 1, reflect the following Board action regarding the *Kidd* case:

Amended Motion #9 – Don moved that the balustrade at . . . Sterling Terrace [Mr. Kidd's residence] did not need to be replaced, but added the proviso that any future request to change/replace any architectural fixture with extenuating circumstances was to be approved by both the AERC committee and the board. Lynn [Fisher] seconded the motion. The motion passed with Don, Lynn [Fisher] and Nancy voting yea, Lyn [Sawyer] abstaining, and Norm and Craig voting nay, and Bill [Kidd] recusing himself.

By letter dated August 6, 2007 contained in Commission Exhibit 2, the Association informed the Commission that the Board had approved Mr. Kidd's removal of the balustrade. The panel in the *Kidd* case then dismissed the case as moot.

The minutes of the November 19, 2007 Board meeting, as contained in Commission Exhibit 1, reflect the following Board action regarding the *Fisher* case:

Motion #1 – Craig motioned that the board ask CCOC to start proceedings in the case. Norm seconded. Craig, Norm and Lyn [Sawyer] voted yea. Nancy and Bill [Kidd] voted nay. Lynn [Fisher] recused herself.

The "proceedings" mentioned in the motion apparently would be enforcement action by the Commission. See letter dated October 25, 2007 from the Commission staff to counsel for the Association, as contained in Commission Exhibit 1. The letter, written after Ms. Fisher had dismissed her Circuit Court appeal, states:

I will appreciate it if you will contact your client and find out if the homeowners have complied with the Commission's order, and if they have not, if the Association wishes me to take legal action to enforce it.

According to an Association letter dated December 19, 2007 contained in Commission Exhibit 2, Ms. Fisher complied with the Commission's order in the *Fisher* case by curing the architectural violation and reimbursing the Association for \$2,800 in legal fees.

At the conclusion of the hearing, the Association requested an award of attorneys' fees should the Panel rule in the Association's favor. The Panel agreed to give the

Association 30 days to submit a request for fees and to give Mr. Zich 15 days thereafter to submit a response to the request. The Panel ordered that the record remain open to receive those submissions.

Thereafter, the Association filed a timely request for fees, supported by affidavit of its counsel. Mr. Zich filed a timely opposition.

III. Findings of Fact

Based on the testimony described above and Commission Exhibits 1 and 2, the Panel specifically finds as follows:

1. The Association is a homeowners association within the meaning of Md. Code Ann., Real Prop. § 11B-101 *et seq.*, and is a common ownership community as that term is used in MC Code Chapter 10B.

2. Mr. Zich is a member of the Association.

3. The Association's Board was expanded from 5 to 7 members in March 2007.

4. Ms. Fisher and Mr. Kidd were elected to the Board in March 2007. At the time, each of them was in dispute with the Association over separate architectural violations.

5. On July 16, 2007, Ms. Fisher voted in favor of a Board motion approving Mr. Kidd's removal of his balustrade. That motion passed.

6. On November 19, 2007, Mr. Kidd voted in favor of relieving Ms. Fisher of the order to pay \$2,800 in legal fees to the Association. That motion failed.³

IV. Conclusions of Law and Discussion

The Panel is satisfied that an agreement between Mr. Kidd and Ms. Fisher, *if one existed*, requiring Ms. Fisher to vote in Mr. Kidd's favor at the July Board meeting and requiring Mr. Kidd to vote in Ms. Fisher's favor if and when the *Fisher* case came back

³ The Panel is aware that the actual motion was to authorize enforcement action against Ms. Fisher, that Mr. Kidd voted against the motion, and that the motion passed. For clarity and consistency with the oral testimony, we have cast the motion as one to relieve Ms. Fisher of the legal fee payment obligation.

before the Board, would violate their duties as directors. *See* Md. Code Ann., Corp. & Ass'ns § 2-405.1(a):

A director shall perform his duties as a director, including his duties as a member of a committee of the board on which he serves:

(1) In good faith;

(2) In a manner he reasonably believes to be in the best interests of the corporation; and

(3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.

See also Robert's Rules of Order (10th ed.) § 45: "No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization;" Internal Revenue Service's sample conflict of interest policy for tax-exempt organizations (available at <http://www.irs.gov/instructions/i1023/ar03.html>): a director who has a direct or indirect financial interest in a matter coming before the organization is required to disclose that interest.

The only evidence offered by Mr. Zich on whether such an agreement existed was the July and November votes themselves. Such evidence may *permit* a factfinder to *infer* corruption. But in the Panel's view such evidence, standing alone, does not *compel* a *presumption* of corruption. *See United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 414 (1999) (under the federal anti-bribery statute, 18 U.S.C. § 201, "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given").

Mr. Kidd denied that there was any agreement with Ms. Fisher. He explained that he had campaigned for the Board because he felt the Board had been too rigid in its enforcement of architectural guidelines. His November 2007 vote to relieve Ms. Fisher of the \$2,800 legal fee award was based on his feeling that the award was a relic of the former Board; that Ms. Fisher had remedied the architectural violation that gave rise to the order; and that \$2,800 was a lot for an individual homeowner to pay.

The Panel found Mr. Kidd's testimony to be both credible and reasonable under the circumstances.

Viewing the evidence as a whole, the Panel concludes that the evidence regarding the existence or non-existence of an agreement between Mr. Kidd and Ms. Fisher is, at best, in equipoise. Since Mr. Zich, as the complainant, bears the ultimate burden of proof that a corrupt agreement existed, he has failed to prove his case by a preponderance of the evidence. *Chesapeake & Potomac Telephone Co. of Maryland v. Hicks*, 25 Md.App. 503, 524 (1975) (when evidence is in equipoise, the party with the burden of proof has failed to prove his case).⁴

Mr. Zich argues alternatively that Ms. Fisher should have recused herself from the July 2007 vote merely because she had her own open architectural issue. However, Mr. Zich has not presented any authority in support of his argument. For example, the Association's organizational documents or policies may treat such circumstances as a conflict of interest, but no such documents or policies were presented to the Panel. Nor is the Panel independently aware of any rule of law disqualifying a board member in such circumstances.

The Panel did hear testimony that one of the issues in the campaign leading up to the March 2007 Board elections was the perceived over-rigid enforcement of architectural guidelines. Furthermore, both the *Kidd* and *Fisher* cases were then pending; so the Association's members presumably knew when they elected Mr. Kidd and Ms. Fisher that their new Board members were in dispute with the Association over architectural matters. The membership is free, if it wishes, to elect Board members who promise to change architectural enforcement policies. The Panel therefore concludes that the mere pendency of a director's own architectural dispute is insufficient to disqualify that director from voting on *another* architectural dispute.

Buttressing that conclusion is the fact that Ms. Fisher's architectural dispute did not involve balustrades and was therefore different from Mr. Kidd's. *See* Commission Exhibit 2, letter dated December 19, 2007 from the Association to the Commission: "Please be advised that the homeowners, Michael Cunningham and Lyn Fisher, have complied with the Commission's order by *painting their deck railing . . .*" (emphasis added).

As to the claim that Board members favor their own when it comes to architectural violations, Mr. Zich relied on the language of the July 2007 motion to the effect that

⁴ Normally, civil disputes are resolved by a preponderance-of-the-evidence standard. The corruption asserted by Mr. Zich is arguably the equivalent of fraud and therefore subject to a higher, clear-and-convincing standard of proof. *See Hoffman v. Stamper*, 385 Md. 1, 16 (2005). Since the Panel finds that the preponderance-of-the-evidence standard has not been met, it need not decide whether the higher standard applies or has been met.

future changes will require approval of both the architectural committee and the Board. The Panel concludes that such evidence is insufficient to prove a case of favoritism.

The Association argued that Mr. Zich's complaint was frivolous and that therefore he should pay the Association's attorneys' fees. The Panel concludes that the complaint was filed in good faith and that it had a reasonable basis in fact. There being no other basis for an award of attorneys' fees, the fee request will be denied.⁵

As Mr. Zich is not the prevailing party, his request for reimbursement of the \$50.00 filing fee will be denied.

V. Order

Based the foregoing findings and conclusions, it is by the Panel this 22nd day of August, 2008, ORDERED as follows:

1. The Complaint is dismissed with prejudice and all relief requested therein is denied.
2. Each party will bear his or its own costs, including attorney's fees.
3. The request for reimbursement of the \$50.00 filing fee is denied.

Panel members Karen Kali and Helen Whelan concur in this decision.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Charles H. Fleischer, Panel Chair

⁵ MC Code § 10B-13(d) permits an award of fees if a party "unreasonably refuses to accept mediation of a dispute." While the Panel understands that Mr. Zich rejected mediation, there was no evidence presented at the hearing as to why he rejected mediation or whether the rejection was unreasonable.